Supreme Court, U.S.
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No. 01-1622

IN THE

Supreme Court of the United States

NATIONAL COALITION TO SAVE OUR MALL,
WORLD WAR II VETERANS TO SAVE THE MALL,
COMMITTEE OF 100 ON THE FEDERAL CITY,
AND D.C. PRESERVATION LEAGUE,

Petitioners,

v.

GALE NORTON, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, COMMISSION OF FINE ARTS,
NATIONAL CAPITAL PLANNING COMMISSION, AND
AMERICAN BATTLE MONUMENTS COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY

The National Coalition to Save Our Mall, World War II Veterans to Save the Mall, Committee of 100 on the Federal City, and D.C. Preservation League hereby reply to the opposition filed by the Federal Respondents Gale Norton, Secretary of the Interior, *et al.*, to the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 6, 2001.

ARGUMENT

1. The Federal Respondents attempt to characterize Petitioners' argument as being a challenge to Congress' plenary authority to enact legislation that confers, limits, or removes the jurisdiction of the federal courts, or to amend the substantive laws that were the basis for Petitioners' lawsuit. As Petitioners now discuss, Section 3 of Public Law 107-11 goes beyond the constitutionally-permissible functions of defining the jurisdiction of the federal courts or amending federal laws. Instead, Public Law 107-11 decided Petitioners' pending case by retroactively stripping the jurisdiction of *all* courts (state and federal) over the case. As a result, this law prevents the courts from applying the new law to decide Petitioners' case, in violation of the principle of separation of powers set forth in *United States v. Klein*, 80 U.S. 128 (1872).

Respondents cite a number of cases standing for the general proposition that Congress has broad power both to control the use of public land, *Kleppe v. New Mexico*, 426 U.S. 529, 531-33 (1976), and "to define and limit the jurisdiction of

the inferior courts of the United States." *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *see also Kline v. Burke Construction Co.*, 260 U.S. 226 (1922). However, it is equally clear that Congress may not violate other constitutional provisions in exercising this plenary authority. *See* Sager, Lawrence Gene, "Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 37 (1981).

The question is not whether Congress has the power to define the jurisdiction of the federal courts. Rather, the question is whether Congress can interject itself into Petitioners' pending lawsuit challenging the decisions approving the World War II Memorial, and strip any and all courts (state or federal) of jurisdiction over that case by retroactively stating that those decisions "shall not be subject to judicial review." Public Law 107-11, § 3. None of the cases cited by Respondents supports the notion that Congress' power to define the jurisdiction of the federal courts encompasses the power to enact legislation whose sole purpose is to strip the courts of jurisdiction over a pending case, which was the fact pattern found to impermissibly encroach upon the essential function of the judiciary in *United States v. Klein*.

For example, in *Lauf v. E.G. Shinner & Co.*, this Court simply acknowledged that the federal courts had only the remedial powers conferred by Congress, and therefore a federal court exceeded its jurisdiction by issuing an injunction against certain union activities that were protected by federal labor laws. Likewise in *Kline v. Burke Construction Co.*, the court held that a federal court had no authority to enjoin a pending action in state court involving the same case or controversy, since the state case did not impair or defeat the federal court's jurisdiction.

Notably, in *Kline*, an alternative venue was available in state court for the adjudication of the dispute in question, and *Lauf* involved only a limitation on the remedial powers of the federal court, and not its jurisdiction over the entirety of the case. Neither *Lauf* nor *Kline* involved any question concerning the effect on a pending case of congressional legislation changing the jurisdiction of the federal courts, much less the effect of congressional legislation enacted for the sole purpose of disposing of a pending case.

Respondents also rely on a series of cases addressing whether a congressional statute will be given retroactive effect. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Bruner v. U.S*, 343 U.S. 112 (1952); and *Assessors v. Osbourne*, 76 U.S. (9 Wall.) 567 (1869). However, none of these cases addresses a situation such as the instant case, in which Congress has passed a law whose sole purpose is to oust jurisdiction over a pending case. Rather, those cases involved congressional statutes that repealed the laws that were the substantive basis for jurisdiction. Here, of course, Section 3 of Public Law 107-11 does not purport to repeal any of the substantive laws that were the basis for Petitioners' action. Instead, Public Law 107-11 deprives the courts of jurisdiction over a challenge to the agency decisions approving the World War II Memorial arising under any law.

For example in *Landgraf v. USI Film Products*, this Court held that a 1991 law creating a right to recover compensatory and punitive damages for certain violations of the Civil Rights Act of 1964 was not applicable to a case pending on appeal at the time the new law was passed. Thus, that case did not involve legislation that even limited, much less removed, the jurisdiction of the court over a pending case. While *dicta* in *Landgraf* acknowledged the rule that a change in jurisdictional rules will be retroactively applied to a pending case, the Court

was careful to explain that such a change "usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Landgraf*, 511 U.S. at 274. That is obviously not the case here, since Public Law 107-11 eliminates the jurisdiction of any and all courts from hearing Petitioners' case.

None of the other cases cited by Respondents deal with a situation where a jurisdictional change eliminates a cause of action altogether. For example, in *Bruner v. U.S.*, this Court held that an amendment to the Tucker Act, which limited the jurisdiction of the federal district courts over suits to recover compensation brought by employees of the United States, barred a pending lawsuit filed in the district court by an employee of the United States. Congress made clear, however, that jurisdiction for claims such as those brought in the *Bruner* case was still available in the Court of Claims. Thus, unlike the present case, the statute involved in *Bruner* was not specifically passed by Congress to strip any and all courts of jurisdiction to hear challenges to a particular action that was the subject of a pending lawsuit.

Likewise, in *Assessors v. Osbourne*, Congress repealed a statute conferring jurisdiction on the federal courts over suits arising over the collection of federal taxes, thereby requiring the federal court to dismiss a pending action arising over the collection of federal taxes. Again, however, as was the case in *Bruner*, Congress did not preclude such actions altogether; instead, the intent of the legislation was that such actions should be brought in state court.

Here, however, Public Law 107-11 does not repeal or amend any of the substantive federal laws that provided the federal question jurisdiction for Petitioners' challenge to the World War II Memorial, nor does it provide for an alternative venue for such challenges. Rather, the legislation seeks to

insulate specific agency decisions approving the location and design of the World War II Memorial from all judicial review after-the-fact, by stripping any court (state or federal) from exercising jurisdiction over challenges to these completed decisions. This is precisely the sort of congressional action found to violate separation of powers principles in *United States v. Klein*. None of the cases cited by Respondents sanction jurisdictional changes that are intended to oust any and all courts from jurisdiction over a pending case as a means of depriving litigants of *any* forum for judicial review of a specific controversial governmental decision.

Respondents next cite *Miller v. French*, 530 U.S. 327 (2000) for the notion that since Congress would have had the authority to suspend any injunction issued by the district court, Congress must necessarily also possess the authority to strip the courts of jurisdiction over the case altogether. Brief for the Federal Respondents in Opposition, at 6-7. However, this is not a fair reading of *Miller v. French*.

The congressional legislation in *Miller v. French* developed new standards governing the entry of injunctive relief in litigation concerning prison conditions. In addition, the new law provided for an automatic stay of any prior injunctive decree entered in such litigation for a 30 to 90 day period while the court determined whether the prior injunction satisfied the new standards. The Court held that the temporary displacement of a remedial order did not violate separation of powers principles set forth in *United States v. Klein*, reasoning that "the entry of the stay does not . . . divest the court of authority to decide the merits of the termination motion." *Id.* at 348.

Accordingly, *Miller v. French* does not support Respondents' attempt to equate legislation that temporarily displaces a remedial order, which was found not to present

separation of powers problems, with legislation that stripped the courts entirely of jurisdiction over a pending case, which is what occurred in both *United States v. Klein*, and in this case. Indeed, Justice Souter specifically stated in his concurring opinion, also joined by Justice Ginsburg, that the legislation *would* implicate separation of powers concerns if the post-stay period was an insufficient time frame for the court to determine whether the injunction satisfied the new standard. *Miller v. French*, 530 U.S. at 351 (Souter, J., concurring in part and dissenting in part).

Likewise, in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 403 (1980), the Court found that legislation conferring jurisdiction in the Court of Claims over certain Indian claims and waiving the *res judicata* effect of a prior judgment did not raise separation of powers concerns, because the Court of Claims "was left completely free to reaffirm its" prior judgment, based on its review of the facts and law. *Id.* at 407. Here, by contrast, Section 3 of Public Law 107-11 stripped the district court of jurisdiction over Petitioners' pending case, and completely foreclosed the judicial branch from asserting any role in interpreting or implementing the laws of Congress, including Public Law 107-11 itself.

Respondents' suggestion that the holding in *United States v. Klein* should be limited only to situations where congressional legislation encroaches on the President's pardon power is without support. Brief for Federal Respondents in Opposition, at 7-8. Both the majority as well as the concurring and dissenting opinions in *Miller v. French* make clear that the separation of powers flaw of the legislation at issue in *Klein* does not rest on the facts of that case involving the Presidential pardon power. *Miller v. French*, 530 U.S. at 348-52. *See also United States v. Sioux Nation of Indians*, 448 U.S. at 403 (making clear that the encroachment on the presidential pardon

power was a constitutional concern that was separate and independent from separation of powers concerns). Rather, the constitutional flaw in *Klein* was Congress' attempt to prescribe a rule of decision, the sole purpose of which was to dispose of a pending case without permitting the Court to rule on the scope or effect of the change in legislation.

Finally, as noted in the petition for certiorari, *Pennsylvania v. Wheeling and Belmont Bridge*, 59 U.S. 421 (1855), *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *Robertson v. Seattle*, 503 U.S. 429 (1992), cited by Respondents, are inapposite here. The actions involved in those cases were straightforward changes in the applicable law, which, when applied to pending cases, affected the appropriateness of previously-entered judicial decrees or resulted in the dismissal of the case altogether. Nonetheless, in each of these cases, the Courts still maintained jurisdiction necessary to permit the courts to interpret and apply the new law to the facts of the pending cases.

Here, of course, Public Law 107-11 went beyond simply amending the various laws applicable to the World War II Memorial; it also divested the courts of jurisdiction over Petitioners' pending case so that no court now has jurisdiction to apply the change in law to the facts in that case. As a result, Congress has usurped the Court's essential judicial function in contravention of the principles requiring separation of legislative and judicial powers established in *United States v. Klein*.

2. Respondents erroneously characterize the petition as arguing that "Public Law 107-11 does not withdraw jurisdiction to review challenges to the location, design and construction of the [World War II] memorial that are based on procedural laws, such as the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*" Brief for the Federal Respondents In Opposition,

at 8. As the petition plainly points out, Section 3 of Public Law 107-11 does indeed withdraw the court's jurisdiction over the entirety of the claims in Petitioners' lawsuit, including the claims based on procedural laws such as the National Environmental Policy Act (NEPA).

Whether Public Law 107-11, apart from Section 3's categorical elimination of jurisdiction, intended by Section 1 to exempt the World War II Memorial from laws such as NEPA is an unresolved interpretative issue that, as Respondents correctly point out, is not within the question Petitioners presented for review. The point here is that Congress, by coupling Section 1's qualified amendment to the substantive law applicable to the World War II Memorial with Section 3's complete withdrawal of federal jurisdiction over Petitioners' pending case, has barred the courts from interpreting the scope of Section 1 to resolve what laws or regulations were intended to remain applicable to the Memorial. In doing so, Congress' attempt to eliminate a controversial lawsuit challenging the lawfulness of agency actions approving the World War II Memorial has unconstitutionally crossed the line that separates the legislative and judicial functions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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